tion is prohibited by the Clayton Act. Nor was the court willing to rely upon the discretion of the strikers themselves in determining what constituted picketing, and in consequence limited them to one representative at each gate of the plant.

Such a limitation seems warranted both by justice and necessity. The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition. It is the persuasion of argument and not that of force. It is clear that the arguments of strikers can be presented at one time as well by one person as by a dozen. It is also clear that force cannot be exerted effectively by one man, although it can by a dozen. The Supreme Court has thus given strikers all that they are entitled to have, and also, without prejudice to them, has made it impossible for them to overstep the bounds of their legal rights. Experience has shown that picketing and violence are too often concomitant to make it possible to establish a picket line without introducing the element of intimidation, and it is to be hoped that the attitude of the Supreme Court will commend itself to those state courts that have heretofore entertained the theoretical rather than the practical view of the objection to picketing.

P. P.

THE DOCTRINE OF RES IPSA LOQUITUR IN PENNSYLVANIA.—The successful harnessing of steam and electricity for industrial and commercial purposes, and the perfection of the gasoline engine, have surrounded us with a multitude of powerful machines and apparatus, which, though harmless in normal operation, may produce serious bodily injury if improperly constructed or managed. It thus becomes increasingly important that the law should place the proper degree of responsibility for injury upon the owner or operator of such apparatus. Ought the fact of injury to raise a presumption of culpability on his part? The doctrine of *res ipsa loquitur* answers this question in the affirmative.

Let us examine briefly the foundation, justification, and general scope of the doctrine, and then its limited application in Pennsylvania. The general rule in actions of negligence is that the mere proof of a so-called "accident" raises no presumption of negligence. But where the thing from which the injury results is in the control of the defendant, and the accident is of a sort which in the normal course of events would not be occasioned by the thing if properly managed, here is a presumption, or ground for a reasonable inference, of negligence on the part of the defendant.[1] In such cases, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from

[1] Scott v. London & St. K. Docks Co., 3 H. & C. 596 (Eng. 1865).

the way in which the thing happened, it may fairly be found to have been occasioned by negligence.[2] Thus the burden of producing the facts is cast upon the defendant, which is indeed justified, because in such cases the power to produce the evidence in question rests exclusively in him. To place such a burden on the plaintiff would be to demand that he procure from the camp of the enemy the evidence upon which his rights as a litigant depend. When the defendant produces evidence of what took place, he is not compelled by most courts to go further and establish his innocence.[3] The "risk of persuasion" remains with the plaintiff.

In Pennsylvania, however, the burden of proof, in the primary sense, shifts to the defendant, who must by a preponderance of evidence prove his conduct was not negligent.[4] Although not supported by textwriters nor by most courts, such a rule, particularly in those cases to which the application of the doctrine of *res ipsa loquitur* is restricted in Pennsylvania, seems to work well in practice. The temptation to the defendant, to satisfy the burden of producing evidence by stating merely such facts as are favorable to him and holding back the rest, is obviated. A real suspicion is cast upon his conduct, which he must explain satisfactorily or pay for in damages.

Inasmuch as the effect given the doctrine in Pennsylvania places upon the defendant a greater burden than in most jurisdictions, we should naturally expect the application to be more limited, and such is the case. The tendency of the courts of this state has been to apply the doctrine only to those cases where an absolute duty, or an obligation practically amounting to that of insurer, exists. Thus it is applied to the case of a passenger, to whom the common carrier owes the duty of exercising the highest degree of care and skill. Even here the history of the doctrine has been one of growing restricted application. As applied to carriers the doctrine was first announced in very general terms in Laing v. Colder,[5] in which the court said that "the mere happening of an injurious accident" to a passenger, while in the hands of the carrier, "raises, *prima facie,* a presumption of neglect, and throws upon the carrier the onus of showing it did not exist." For some years this rule was applied quite freely. Thus an injury to a passenger resulting from a train running into a cow unlawfully on the railroad track, cast a presumption of negligence upon the carrier.[6] Toward the end of the last century, however, it was definitely settled that the rule of Laing

[2] See "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof"—Prof. F. H. Bohlen, 68 U. OF PA. LAW REVIEW 307.

[3] Sweeney v. Erving, 228 U. S. 233, 57 L. Ed. 815 (1912).

[4] Baran v. Reading Iron Co., 202 Pa. 274, 51 Atl. 979 (1902).

[5] 8 Pa. 479, 49 Am. Dec. 533 (1848).

[6] Sullivan v. Phila. & Reading R. R. Co., 30 Pa. 234, 72 Am. Dec. 698 (1858).

v. Colder is restricted to cases in which it is clearly shown "that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation." [7] The doctrine thus limited is usually strictly construed in Pennsylvania. The Supreme Court, for example, held it inapplicable where the accident was to the passenger and not to the car, even though the injury resulted from a jolt chargeable to the manner of coupling the car.[8] Similarly there was held to be no presumption of negligence on the part of the carrier where a passenger was killed by a huge rock falling from a hillside, adjacent to the right of way, upon a passing train.[9] The decision in the latter case seems to show a reversal of attitude on the part of the court, subsequent to the time when it decided the case of the cow on the track, referred to above. The basis for applying the doctrine in these cases is the contract on the part of the railroad to carry safely, hence the reason falls and the doctrine does not apply as between the carrier and its employee. The application of the doctrine of *res ipsa loquitur* to master and servant cases has been persistently denied in Pennsylvania.[10]

In cases where there is no absolute duty owed, nor any duty as insurer, the Pennsylvania courts have been even more loath to apply the doctrine of *res ipsa loquitur*. Until quite recently it seemed essential, in such cases, to prove exclusive control in the defendant, and the fact that a contractual relation existed between the parties.[11] The high water mark of restricted application was reached under the leadership of Chief Justice Mitchell, who on one occasion characterized the doctrine as "dangerous and uncertain at best," [12] and who held that it ought never to be applied except where it both supports the conclusion contended for and reasonably excludes every other.[13]

In recent years there seems to have been an unmistakable tendency on the part of the courts of Pennsylvania to apply the doctrine more liberally wherever the element of exclusive control in the defendant can be shown.[14] Indicative of this trend is a dictum con-

[7] Thomas v. Phila. & Reading R. R. Co., 148 Pa. 180, 23 Atl. 989 (1892); Ginn v. Penna. R. R. Co., 220 Pa. 552, 69 Atl. 992 (1908).

[8] Herstine v. Lehigh Valley R. R. Co., 151 Pa. 244, 25 Atl. 104 (1892).

[9] Fleming v. Pittsburgh, C., C. & St. Louis Ry., 158 Pa. 130, 27 Atl. 858 (1893).

[10] L. R. A. 1917 E, p. 150 cites many cases on this point.

[11] Shafer v. Lacock, Hawthorn & Co., 168 Pa. 497, 32 Atl. 44 (1895); Stearns v. Ontario Spinning Co., 184 Pa. 519, 39 Atl. 292 (1898); Alexander v. Maryland Steel Co., 189 Pa. 582, 42 Atl. 286 (1899).

[12] Allen v. Kingston Coal Co., 212 Pa. 54, 61 Atl. 572 (1905).

[13] Zahniser *et al.* v. Penna. Torpedo Co., 190 Pa. 350, 42 Atl. 707 (1899).

[14] Hauer v. Erie C. Electric Co., 51 Pa. Super. 613 (1912); Rafferty v. Davis, 260 Pa. 563, 103 Atl. 951 (1918).

tained in a recent case,[15] in which the deceased was employed by a manufacturing concern to unload a coal car on a private siding. A train of box cars, standing on the same track at the top of a grade, were improperly coupled with an engine by the employees of the defendant, and ran by force of gravity into the coal car, killing the deceased. The court said the case seemed to be one to which the doctrine of *res ipsa loquitur* might be applied. It is interesting to note that there existed in this case no absolute duty, no obligation as insurer, and no contractual relation—there was merely a duty to use reasonable care—and yet the Supreme Court considered the doctrine applicable.

Although apparently gaining in favor with the Pennsylvania courts, yet the general doctrine of *res ipsa loquitur* remains greatly limited in its application in this State,[16] and must necessarily remain so because of the unusual burden it casts upon the defendant in this jurisdiction. It is submitted, however, that the more liberal attitude recently manifested by our Supreme Court is justified by the increased dangers to the public under existing industrial conditions, and is consonant with enlightened jurisprudence in other jurisdictions.

A. B. V. B.

THE SITUS OF STOCK EXCHANGE SEATS FOR PURPOSES OF TAXATION.—It is not a violation of the Due Process Clause (of the Fourteenth Amendment to the Federal Constitution) for a State to tax a resident on his seat in a Stock Exchange in another state, according to the case of Anderson v. Durr, recently decided by the United States Supreme Court.[1] Anderson, being taxed in Ohio, his domicile, on his seat in the New York Stock Exchange, petitioned for an injunction on the ground that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable *situs* must be regarded as not within the jurisdiction of the State of Ohio. His contention found favor in the sight of Mr. Justice Holmes, who said that the foundation and substance of the plaintiff's right was the right to enter the building and do business there, which right was localized in New York; and that, standing like an interest in land, it should be taxable only by that State. The majority held, however, that the membership is personal property, and having no fixed *situs*, has a taxable *situs* at the domicile of the owner. The case involves three interesting questions: (1) Is such a membership taxable property? (2) What is its proper *situs*

[15] Di Iordio v. Director General of Railroads, 270 Pa. 111, 112 Atl. 747 (1921).

[16] Douds v. Beaver Valley Traction Co., 54 Pa. Super. 477 (1913); Fitzpatrick v. Penfield, 267 Pa. 564, 109 Atl. 653 (1920).

[1] No. 27, Oct. Term, 1921. Decided Nov. 7th, 1921.